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COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

W. Tayloe Murphy, Jr.
Secretary of Natural Resources

West Central Regional Office
3019 Peters Creek Road, Roanoke, Virginia 24019
Telephone (540) 562-6700, Fax (540) 562-6725
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Robert G. Burnley
Director

Steven A. Dietrich
Regional Director

STATE WATER CONTROL BOARD ENFORCEMENT ACTION SPECIAL ORDER BY CONSENT ISSUED TO BOONE HOMES, INC. OF ROANOKE

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code § 62.1-44.15(8a) and (8d) by the Board to Boone Homes, Inc. of Roanoke, for the purpose of resolving certain violations of environmental law and/or regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Va. Code" means the Code of Virginia (1950), as amended.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 62.1-44.7 and 10.1-1184.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 1183.
4. "Director" means the Director of the Department of Environmental Quality.
5. "Order" means this document, also known as a Consent Order.
6. "Boone" means the Boone Homes, Inc. of Roanoke, a Virginia corporation.
7. "WCRO" means the West Central Regional Office of DEQ, located in Roanoke, Virginia.
8. "Regulation" means the Virginia Water Protection Permit Program Regulation, 9 VAC 25-210-10 *et seq.*
9. "The Facility" means a stormwater management facility at Stone Manor, a subdivision under construction at Roselawn Road and Longview Drive in Roanoke County, Virginia. The

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parcel in Stone Manor where the facility is located is listed in Roanoke County records as Tax Parcel ID 086.01-03-01.04-000.

SECTION C: Findings of Fact and Conclusions of Law

1. Boone constructed the Facility in an unnamed tributary of Mudlick creek in early 2003. Boone had previously obtained a VPDES construction stormwater permit for land clearing and grading activities and had specified the location of the Facility in the stormwater registration materials. DEQ staff and U.S. Army Corps of Engineers (Corps) staff inspected the Facility on October 22, 2004 and determined that because the impacted stream is perennial, it is subject to the regulatory jurisdiction of the Corps and the Virginia Water Protection (VWP) Permit program. An individual VWP permit is required to place a stormwater management facility in a perennial stream.
2. DEQ staff inspected the facility a second time on November 10, 2004 and verified the perennial status of the stream.
3. Boone has not obtained a VWP permit for construction of the Facility.
4. Code § 62.1-44.5.A states that

Except in compliance with a certificate issued by the Board, it shall be unlawful for any person to: 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances; 2. Excavate in a wetland; 3. Otherwise alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses; or 4. On and after October 1, 2001, conduct the following activities in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that caused significant alteration or degradation of existing wetland acreage or functions.

5. On January 21, 2005, DEQ issued a Notice of Violation to Boone for constructing the Facility without a VWP permit in violation of Code § 62.1-44.5 and 9 VAC 25-210-50.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in Va. Code §62.1-44.15(8a) and (8d), orders Boone, and Boone agrees, to perform the actions described below and in Appendix A of this Order. In addition, Board orders Boone, and Boone voluntarily agrees, to pay a civil charge of \$4,500.00 within 30 days of the effective date of this Order in settlement of the violations cited in this Order. Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia". Payment shall be sent to:

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Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, VA 23240

Payment shall include Boone's Federal Identification Number and shall state that it is being tendered in payment of the civil charges assessed under this Order.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of Boone, for good cause shown by Boone, or on its own motion after notice and opportunity of Boone to be heard.
2. This Order only addresses and resolves those violations specifically identified herein. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (a) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (b) seeking subsequent remediation of the facility as may be authorized by law; or (c) taking subsequent action to enforce this Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.
3. For purposes of this Order and subsequent actions with respect to this Order, Boone admits the jurisdictional allegations contained herein.
4. Boone declares that it has received fair and due process under the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.* and the State Water Control Law, Va. Code § 62.1-44.2 *et seq.* and waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and agrees to waive any objection to, or appeal from, the entry of this Order. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or judicial review of, any action taken by the Board to enforce this Order.
5. Failure by Boone to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
6. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
7. Boone shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. Boone shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Boone shall notify the WCRO Regional Director in writing when circumstances are anticipated to occur, are

occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of this Order. Such notice shall set forth: (a) the reasons for the delay or noncompliance; (b) the projected duration of any such delay or noncompliance; (c) the measures taken and to be taken to prevent or minimize such delay or noncompliance; and (d) the timetable by which such measures will be implemented and the date full compliance will be achieved. Failure to so notify the WCRO Regional Director within forty-eight hours of learning of any condition above, which Boone intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim of inability to comply with a requirement of this Order. The date of notification is defined by postmark, fax time stamp, or some similar method of recordation.

- 8. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.
- 9. This Order shall become effective upon execution by both the Director or his designee and Boone. Notwithstanding the foregoing, Boone agrees to be bound by any compliance date that precedes the effective date of this Order.
- 10. Any plans, reports, schedules or specifications attached hereto or submitted by Boone and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
- 11. This Order shall continue in effect until: a) Boone petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of this Order, b) the Director or Board terminates the Order in his or its sole discretion upon 30 days notice to Boone, whichever occurs earlier. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Boone from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.
- 12. The undersigned representative of Boone certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind Boone to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of Boone.
- 13. By the signature of an authorized official below, Boone voluntarily agrees to the issuance of this Order.

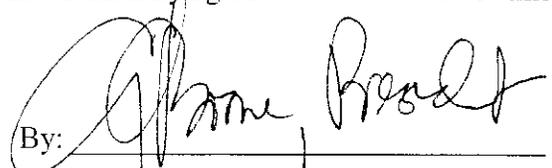
And it is so ORDERED this 8th day of DECEMBER, 2005.

Steven A. Dietrich
FOR Robert G. Burnley, Director

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Department of Environmental Quality

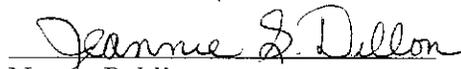
Boone Homes, Inc. of Roanoke voluntarily agrees to the issuance of this Order.

By: 

Commonwealth of Virginia

City/County of Roanoke

The foregoing document was signed and acknowledged before me this 29th day of August, 2005, by G.L. Boone, who is President of Boone Homes, Inc. of Roanoke


Notary Public

My commission expires: September 30, 2007

**APPENDIX A
SCHEDULE OF COMPLIANCE**

1. Except in compliance with a VWP permit, Boone shall not dredge, fill or discharge any pollutant into, or adjacent to surface waters, or otherwise alter the physical, chemical or biological properties of surface waters, excavate in wetlands, or conduct the following activities in a wetland: a) New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b) Filling or dumping; c) Permanent flooding or impounding; d) New activities that cause significant alteration or degradation of existing wetland acreage or functions.
2. **Not later than November 1, 2005**, Boone shall either:
 - a. Submit to DEQ for review and approval a complete compensatory mitigation plan and schedule ("Plan") for impacts caused by Boone to State waters located between the storm water drainage outfall located opposite "Belcroft Court" to the outlet protection installed downstream of the storm water detention pond located in the unnamed tributary of Mudlick Creek adjacent to Longview Road. Stream restoration, riparian buffer preservation, and /or riparian buffer restoration may be used to compensate impacts on-site in accordance with the requirements specified in the Virginia Water Protection Permit Regulation, 9 VAC 25-210-80 and 9 VAC 25-210-115. The Plan shall include a draft of the written restrictions described in Paragraph 3 below and a plat of the proposed compensation areas. Riparian buffer widths shall be a minimum of 50 feet, on average, on each side of Mud Creek and of the unnamed tributary of Mudlick Creek located within the boundaries of the Stone Manor subdivision. In the event on-site compensation is determined to be partially or wholly infeasible, compensation shall occur off-site by available compensation methods, including a contribution payment to Virginia Aquatic Resources Trust Fund, as needed to fully compensate for the stream impact described above; or
 - b. In lieu of providing stream compensation as outlined in Paragraph a. above, Boone may submit to DEQ for review and approval a plan and schedule for removing the storm water management facility from the unnamed tributary of Mudlick Creek. The removal plan shall describe methods proposed to remove accumulated sediments from upstream of the storm water management facility in advance of removing the storm water management facility.
3. Boone shall respond to any written comments from DEQ regarding the Plan within 30 days of receipt of such comments. Written restrictions, protections, or preservations of compensatory mitigation areas must be recorded for all stream mitigation areas, **within 30 days** of DEQ's approval of the Plan. Notification of recordation must be received by DEQ within **30 days** of recordation. Boone shall comply with the Plan as approved by DEQ.
4. All reports required by this Order shall be signed by an authorized representative of

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Boone Homes, Inc. of Roanoke

Boone. All submittals required by this Order shall contain the following signed certification statement:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violation.

5. Written communications and reports required by this Order shall be submitted to the Department of Environmental Quality, West Central Regional Office, 3019 Peters Creek Road, Roanoke, Virginia 24019.

APPENDIX B

STREAM MITIGATION CHECKLIST

This checklist contains a list of the information that must be included in a final compensatory mitigation plan for stream impacts. The final compensatory mitigation plan must include protection of all surface waters and upland areas identified in the plan, which shall be preserved in perpetuity within the compensation site boundary. This list is based upon the requirements found in the Virginia Water Permit Regulation, 9 VAC 25-210-80. These items must be submitted for a complete compensatory stream mitigation plan.

- The goals and objectives in terms of water quality benefits.
- A location map, including latitude and longitude (to the nearest second) at the center of the site.
- The proposed stream segment restoration locations, including plan, profile and cross-section sketches showing the design of the restored channel.
- The stream deficiencies that need to be addressed.
- The restoration measures to be employed, which must be based upon an analysis of existing stream deficiencies, including current stream classification and hydrology regime. The hydrology evaluation must consider the drainage area and current and future land cover and land uses upgradient of the compensation site.
- Structures and features considered necessary for the success of the plan.
- A final grading plan.
- An erosion and sedimentation control plan.
- A site access plan.
- A soil preparation and amendment plan.
- A final design of all water control and/or instream structures.
- A proposed construction and planting schedule.
- A riparian buffer planting scheme, including proposed native plant species, zonation, and acreage of plantings proposed.

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- An abatement and control plan for undesirable plant species.
- A monitoring plan, including proposed success criteria, monitoring goals, and the location of photostations, channel stability monitoring methods, vegetation sampling points, and a reference stream (if available).
- Proposed deed restriction language for protecting the compensation site or sites in perpetuity; a copy of model language is attached.